WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
September 2009

This calendar contains cases that originated in the following counties:

Brown
Jefferson
Milwaukee
Walworth
Washington

To be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

FRIDAY, SEPTEMBER 11, 2009
9:45 a.m. 08AP52 - State v. Daniel Arends
10:45 a.m. 08AP880-CR - State v. Robert L. Artic, Sr.
1:30 p.m. 07AP1083-D - Office of Lawyer Regulation v. Alan D. Eisenberg

TUESDAY, SEPTEMBER 15, 2009
9:45 a.m. 07AP477 - William N. Ehlinger v. Jon A. Hauser and Evald Moulding, Inc.
10:45 a.m. 08AP1011-CR - State v. James W. Smith
1:30 p.m. 07AP1378-CR - State v. Jermichael James Carroll

FRIDAY, SEPTEMBER 18, 2009
9:45 a.m. 08AP10 - Mark J. Solowicz, et al. v. Forward Geneva National, et al.

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
FRIDAY, SEPT. 11, 2009
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Washington County Circuit Court decision, Judge John A. Fiorenza, presiding.

2008AP52 State v. Arends

In this case, the Supreme Court is asked to review whether a man committed under Wis. Stat. § Ch. 980, the state's sexual predator law, is entitled to an evidentiary hearing on his discharge petition.

Some background: Daniel Arends, now 23 years old, was committed as a sexually violent person on January 21, 2005. The court record indicates he has had a long history of behavioral problems in the community, school and at home.

In September 2000, Arends was found guilty as a juvenile of second-degree sexual assault/use of force, and placed at Ethan Allen School for one year. The offense included repeated oral sexual assault against an intellectually limited youth at Lad Lake in March of 2000. Arends' placement at Ethan Allen was extended a number of times.

In a 2003 extension order, it was found that Arends continued to engage in sexual misconduct. He was scheduled for release in 2004, and the state brought a ch. 980 petition. In January 2005, a jury committed Arends as a sexually violent person. In August 2005, Arends filed a default petition for discharge. Based on a report by a forensic psychologist, he contended he no longer met the criteria for ch. 980 commitment, and that he was no longer more likely than not to commit a future act of sexual violence.

The circuit court denied the petition, stating it did not find probable cause to conduct a hearing on the petition.

The Court of Appeals reversed. Applying its interpretation of § 980.09, the Court of Appeals determined that Arends' petition, together with the psychologist's report, merited an evidentiary hearing on the discharge petition.

The state asks this court to review the following:

- *Whether the Court of Appeals correctly interpreted legislative intent in adopting new language in § 980.09, "when it held that the standard for granting a discharge trial had not changed despite the legislature's selection of language new and different from the language of repealed Wis. Stat. § 980.09(2)(2003-04)?"*
- *Whether § 980.09 allows a circuit court to deny a petition for discharge without a hearing if, after weighing all the information presented, it concludes that the petition has not alleged sufficient facts to support the conclusion that the petition showed a change in his condition or his dangerousness?*

WISCONSIN SUPREME COURT
FRIDAY, SEPT. 11, 2009
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Timothy M. Witkowiak, presiding.

2008AP880-CR State v. Artic

In this criminal case, the Supreme Court is asked to review whether a warrantless entry by police was valid, given the circumstances in this case, and if there should be a rule barring fruits of any search or seizure where police are alleged to have manufactured exigent circumstances.

Some background: Robert Lee Artic, Sr., seeks review of a Court of Appeals' decision, affirming his conviction of one count of maintaining a drug trafficking place and one count of possession with intent to deliver cocaine as party to a crime.

Before the warrantless search, officers had arrested Artic's son for possession of cocaine with intent to deliver shortly after they observed him leaving Artic's residence. At the suppression hearing, the officers testified to the effect that after arresting the son, they planned to secure the residence and obtain a search warrant.

One of the officers indicated he was going to verify whether anyone was present in the residence. Officers saw lights on and heard noises before breaking in the front door. After securing the first floor, officers went up the stairs to the second floor, where one of the officers knocked on a door, which Artic opened.

An officer advised Artic that he had arrested Artic's son with a large amount of cocaine and police asked permission to search. Police say Artic consented to the search; Artic contends he did not. Police found cocaine.

Artic argues that police violated his constitutional rights when they entered his duplex and searched it without a warrant. He also argues that his attorney did an insufficient job of raising this issue at trial. The trial court determined that exigent circumstances justified the warrantless entry and search, and therefore, denied the motion to suppress. Artic appealed.

In affirming the circuit court's decision, the Court of Appeals relied on Artic's consent to search.

The state argued that because the search and seizure were pursuant to consent, and the subsequent seizure of evidence was sufficiently attenuated from the initial illegal entry to be lawful, Artic failed to prove that counsel's alleged deficiencies caused any prejudice. The Court of Appeals agreed with the state, that even if the initial entry was improper, Artic could not prove any prejudice resulting from trial counsel's alleged deficiencies because of his consent to search.

The Supreme Court is expected to determine whether the evidence that was recovered from the duplex and used to convict Artic Sr., should have been suppressed.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 11, 2009
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court.

2007AP1083-D OLR v. Alan D. Eisenberg

In this lawyer discipline case, Attorney Alan D. Eisenberg has appealed one of two counts of misconduct alleged in a complaint filed by the Office of Lawyer Regulation (OLR).

Some background: Eisenberg, who has a practice in Milwaukee, was admitted to practice law in Wisconsin in 1966. The alleged misconduct involves Eisenberg's representation of William Deutsch in a Jefferson County divorce action and a criminal case. Deutsch was charged with, and later acquitted by jury of, battery, disorderly conduct and second-degree recklessly endangering safety. The criminal charges arose out of a report of domestic violence made by Deutsch's estranged wife, Margaret.

The day after the jury verdict in the criminal case, Eisenberg filed a civil lawsuit on behalf of Deutsch against Margaret. The civil complaint, which sought damages against Margaret, alleged that she had made false statements to police, causing Deutsch to be falsely arrested, prosecuted and defamed.

Eisenberg served the summons and complaint in the civil action on Margaret's attorney at a previously scheduled pre-trial conference in the divorce action that Margaret did not attend. At the pre-trial conference, Eisenberg told a family court commissioner that a juror from the criminal trial had reported that jurors demanded that Margaret be charged with perjury.

The civil suit was assigned to a different judge, who then dismissed the malicious prosecution and false imprisonment claims, but not the claims for abuse of process and defamation.

At Eisenberg's request, the judge in the civil case directed the parties to mediate the matter before the judge who had handled the criminal case. Eisenberg did not appear at the mediation session, and the judge handling the civil case dismissed Deutsch's remaining claims, granting Margaret default judgment on her counterclaims as a sanction for Eisenberg's failure to appear. Eisenberg's motion for reconsideration was denied, and his appeal was dismissed.

Margaret's attorney filed a motion asking the Circuit Court to deem the civil lawsuit filed by Eisenberg frivolous under Wis. Stat. § § 802.05 and 814.025. The judge assigned to that case concluded that Eisenberg filed the civil lawsuit to harass and maliciously injure Margaret – a decision upheld in a special proceeding by a reserve judge.

The reserve judge awarded Margaret a judgment against Eisenberg in the amount of $102,660 and against William in the amount of $11,406. Eisenberg requested reconsideration, which the court denied, ordering Eisenberg to pay Margaret's attorneys fees and costs for responding to the motion. Eisenberg appealed. The court of appeals affirmed the judgment, and also deemed the appeal frivolous and remanded the matter to the circuit court for a determination of Margaret's appellate attorney fees and costs. The Supreme Court denied Eisenberg's petition for review.

Eisenberg filed *pro se* motions to adjourn and to deny fees for the appeal and the underlying action. The circuit court found that Eisenberg's motion to deny fees was frivolous and ordered him to pay Margaret $22,298 in appellate costs and fees. Eisenberg subsequently paid all attorneys fees and costs ordered in both the civil case and the appeal.

Count one of the OLR's complaint alleged that Eisenberg filed the complaint and pursued the civil action when he knew the lawsuit would serve merely to harass or maliciously injure Margaret. Count two of the OLR's complaint alleged that Eisenberg's *pro se* motion to deny fees for the underlying action, when he knew all appeals had been exhausted, was unwarranted under existing law and without a good faith basis for an extension, modification or reversal of existing law.

The referee concluded that Eisenberg violated the Rules of Professional Responsibility as alleged in count one. The referee found that the OLR failed to meet its burden of proof on count two. Eisenberg has appealed the referee's finding of misconduct, arguing that the evidence does not support a finding that there was no legitimate purpose to the civil action.

Eisenberg has also appealed the referee's recommendation as to the appropriate level of discipline, contending a reprimand would be appropriate. The OLR's complaint had sought a six-month suspension of Eisenberg's law license. The referee "strongly recommends that Mr. Eisenberg's license to practice law be revoked," contending, among other things, that Eisneberg made up the story about jurors demanding Margaret be charged with perjury.

The Supreme Court is expected to decide whether Eisenberg violated a Rule of Professional Conduct and, if so, the appropriate penalty.

WISCONSIN SUPREME COURT
TUESDAY, SEPT. 15, 2009
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Jefferson County Circuit Court decision, Judge Jacqueline R. Erwin, presiding.

2007AP477 Ehlinger v. Hauser

This case examines the enforceability of buyout provisions in a "buy-sell" agreement and the propriety of an award of litigation costs.

Some background: Jon Hauser and William Ehlinger, once friends, each own half of the Evald Moulding Company stock. Hauser had worked as Evald's president, chief executive officer and treasurer, managing daily operations. Ehlinger served as the company's secretary.

In 1992, Ehlinger and Hauser entered into an agreement providing for a buy out in the event of disability. The meaning of the term "book value" as used in the Agreement gave rise to this dispute.

After Ehlinger was diagnosed with Parkinson's disease, in June 2001, Hauser invoked the agreement's disability buyout provisions. He offered to buy Ehlinger's shares for $431,400, which Hauser claimed was "book value" according to the agreement.

Ehlinger was given the opportunity to inspect Evald's books to verify "book value." At an April 22, 2002 annual shareholders and directors meeting, Ehlinger moved that Evald's books be audited by an independent certified public accountant to determine values. Hauser declined to second Ehlinger's motion. Ehlinger did not accept the buyout tender and sued, seeking declaratory relief. Ehlinger claimed the alleged "book value" was ambiguous and that determining the book value would be impossible due to unreliable financial statements and the condition of Evald's books.

The circuit court granted Ehlinger judgment, dissolving and liquidating Evald. Over Ehlinger's objection, the court also ruled that Evald's assets could be used to pay Hauser's attorneys fees.

The Court of Appeals held that the absence of information necessary to complete an analysis under generally accepted accounting principles rendered the disability buyout provisions unenforceable because Evald's book value could not be determined.

The court of appeals also determined that because the trial court had ordered that Hauser be indemnified, the statutory procedures for reimbursement under Wis. Stat. § 180.0855 were satisfied.

A decision by the Supreme Court could clarify law related to the enforceability of buyout provisions in a "buy-sell" agreement and the awarding of litigation costs under such an agreement.

WISCONSIN SUPREME COURT
TUESDAY, SEPT. 15, 2009
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Brown County Circuit Court decision, Judge Richard J. Dietz, presiding.

2008AP1011-CR State v. Smith

In this case, the Supreme Court is asked to review the constitutionality of requiring a person convicted of a crime with no sexual component to register as a sex offender.

Some background: In 2001, James W. Smith was convicted of false imprisonment of a minor victim as party to a crime. There is no dispute that the crime did not have any sexual component. The record indicates that Smith and other individuals falsely imprisoned the victim and threatened him with a gun in a dispute over a drug debt. Smith pleaded no contest to false imprisonment and theft, and he was required under Wis. Stat. § 301.45, to register as a sex offender.

In 2005, Smith was charged with failing to provide an annual update and to respond to written requests from the state Department of Corrections. Smith moved to dismiss the charges, claiming § 301.45 is unconstitutional because it is overbroad, denied equal protection, and violated substantive due process because it lacked a rational basis when applied to his circumstances.

Wis. Stat. § 301.45 (1d) (b) defines a sex offense to include a violation of the false imprisonment statute, Wis. Stat. § 340.30, if the victim was a minor and the person who committed the violation was not the victim's parent.

Smith's motion was denied, and he pled guilty. He was sentenced to one year initial confinement and one year extended supervision. Smith appealed, and the Court of Appeals affirmed.

The Court of Appeals said due process protects against government action that either shocks the conscience or interferes with rights implicit in the concept of ordered liberty. The Court of Appeals said Smith only raised an "as applied," and not facial challenge to the statute. He had the burden of showing beyond a reasonable doubt that § 301.45 as applied to him was unconstitutional, and Smith did not meet that burden, the Court of Appeals concluded.

Smith raises questions of due process and equal protection. He argues being labeled a sex offender damages his reputation and restricts his right to privacy, his choice of residency, and employment. He notes that many local jurisdictions are creating, or have already created, restrictions on a person's ability to reside in certain locations if they are registered as a sex offender.

The state says Smith has not identified a fundamental liberty interest being infringed upon, and that the Court of Appeals correctly recognized that including false imprisonment of a minor as a sex offender furthers the goal of protecting children from violence. In addition, the state argues a sex offense is defined under § 301.45 to include the crime of false imprisonment of a minor.

WISCONSIN SUPREME COURT
TUESDAY, SEPT. 15, 2009
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Charles F. Kahn, presiding.

2007AP1378-CR State v. Carroll

In this case, the Supreme Court is asked to review if photographic evidence obtained from a cell phone can be used as a factual basis for a subsequent warrant and arrest for drug and weapon charges.

A critical question presented here is whether or not Jermichael James Carroll was under arrest or detained incident to an investigative stop when the police officer obtained evidence from Carroll's phone.

Some background as summarized, in part, by the Court of Appeals: A police detective and FBI agent had the house of a suspected armed robber under surveillance when they saw a vehicle depart from the house.

The partners pursued the vehicle driven by Carroll, who eventually pulled into a gas station and "came to an abrupt stop" with Carroll quickly exiting the driver's seat with something in his hand.

The officer drew his gun and ordered Carroll to drop what was in his hand and to get down on the ground. After handcuffing and patting down Carroll, the officer picked up the item, which was a cell phone. The officer said the cell phone was open and displayed a picture of Carroll smoking "what's commonly referred to as a blunt, a marijuana cigarette, a cigar."

Carroll was asked for identification and gave his name, but indicated he did not have any identification with him. The officers ran a routine wanted check on Carroll's name and learned that his driver's license was suspended and therefore he should not have been driving.

Carroll was "taken into custody," although there was no testimony that anyone told Carroll he was under arrest. Carroll was placed in the back seat of the officer's vehicle. The officer scrolled through several photos that he believed to portray illegal drugs, firearms and large amounts of cash. The officer also answered a call that came in at this time and pretended to be Carroll. The caller allegedly wanted to purchase 4.5 ounces of cocaine.

The officer applied for a search warrant to retrieve from the cell phone "stored telephone numbers, address book names, video clips, photographs, and related information." The search sought and subsequently revealed several images of Carroll with a firearm he was not permitted to possess as a felon.

Carroll moved to suppress the evidence seized from the cell phone, arguing the warrantless search of his cell phone's photo gallery at the scene of the traffic stop was unlawful.

The state argued that Carroll was under arrest when the officer looked through the cell phone's photo gallery, and that the viewing of the cell phone's photo gallery was part of a lawful search incident to arrest.

The trial court ruled that Carroll was not under arrest. It found that when Carroll dropped his cell phone, it landed in an open position, revealing - in plain view - a single photo of Carroll allegedly smoking marijuana. However, the trial court ruled that the officer's subsequent search of the cell phone's photo gallery was illegal, and granted the motion to suppress.

The Court of Appeals reversed, concluding the detective lawfully searched the cell phone's photo gallery incident to arrest. Even if the warrantless search of the cell phone's photo gallery was invalid, the subsequent search under the warrant was valid because untainted evidence (i.e., evidence that a person called Carroll's cell phone and asked to buy drugs) provided probable cause for the warrant, according to the Court of Appeals.

A decision by the Supreme Court is expected to involve an application of the standards articulated in State v. Swanson, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991) (citations omitted), *abrogated on other grounds by* State v. Sykes, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277.

WISCONSIN SUPREME COURT
FRIDAY, SEPT. 18, 2009
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Walworth County Circuit Court decision, Judge James L. Carlson, presiding.

2008AP10 Solowicz v. Forward Geneva National

In this case, the Supreme Court is asked to review issues related to restrictive covenants and case law involving the Condominium Ownership Act, Wis. Stat. ch. 703.

Some background: This dispute involves three condominium owners in Geneva National, a 1,600-acre master-planned community near Lake Geneva and various entities associated with its development.

Geneva National includes golf courses, clubs, private roadways and utilities, single- and multi-family residences, including 32 condominiums, and commercial – a condominium community, according to the three condominium owners.

The condominium owners sought a declaratory judgment to invalidate the restrictive covenant forming Geneva National's governing structure. They contend the restrictive covenant is unenforceable because it grants the developer too much control, contrary to the Act, and that the restrictive covenant is ambiguous, unreasonable, against public policy and void.

The condominium owners also argue that the developer could unilaterally exercise its powers and perpetually control the majority of the association's board through its own four votes, and its power to remove or appoint any other officer on the board. The condominium owners also contend that the association and the trust were mere figureheads, and that the developer controls the community and assesses unit owners without recourse.

The circuit court dismissed the condominium owners' complaint, finding that the covenant was clear and specific, and therefore not subject to a separate reasonableness evaluation. The circuit court also determined that because the Restrictive Covenant is not a condominium instrument, it is not subject to ch. 703.

The Court of Appeals affirmed, observing that Geneva National was not a condominium, but a "private quasi-town." Key to its decision was that the complaints related to the community as whole, that is, how the master plan, rather than the individual condominiums, was being developed. The Court of Appeals concluded the covenant lacks the statutory requisites necessary to comprise a condominium instrument within the meaning of ch. 703.

The developers explained that master-planned communities present a complex development method, distinct from condominiums, requiring the developer to retain control so that it may react to varying market and government conditions.

The condominium owners contend the covenant conflicts with ch. 703, which would require a developer to develop the property within three years, or ten years, if it is expandable, and that both time limits long passed.